PUBLIC PROSECUTOR

v.

CHIONG CHENG WAH

HIGH COURT MALAYA, PENANG
MOHAMED. DZAIDDIN J
[CRIMINAL TRIAL NO. 58-22-82]
15 JANUARY 1988

CRIMINAL LAW AND PROCEDURE: *Offence under s. 3 of Firearms (Increased Penalties) Act 1971 - Committed during course of commission of robbery - Discharge of firearm with intent to cause hurt or death - Whether necessary that hurt or death is caused.*

EVIDENCE: *Proof that accused fired the particular gun - Whether necessary for the prosecution to prove that accused fired that particular gun - Identification of accused in identification parade - Whether visual identification needs corroboration.*

On 12 March 1982 at 11.20 p.m. the accused and a few others went to a wooden shed at Thean Teik Estate, Air Itam, Pulau Pinang, where several people were gambling, with intention to rob them. A shot was fired and the gamblers ran for cover except for PW2 who stayed put on her seat. The accused came about 1 - 2 feet near her pointing a pistol at her. He snatched her handbag and a necklace and tried to grab her bracelet but failed. The accused became angry and fired a shot at PW2 hitting her left chin. She fainted and became unconscious and was taken to the General Hospital, Penang. The bullet that entered her chin did not make an exit. An operation was carried out to remove the bullet on 21 May 1982 and the accused was arrested on 27 May 1982. On 28 June 1982 PW2 picked up the accused from the identification parade as the one who had shot her. The accused was charged under s. 3 of the Firearms (Increased Penalties) Act 1971 ("the Act").

Held:

[1] There was overwhelming evidence that on the night of 12 March 1982 there was a robbery which was a scheduled offence under s. 3 of the Act. The Section provides for a discharge of a firearm with intent to cause death or hurt; it is immaterial whether death or hurt is caused or not. The learned Judge was satisfied that the accused had discharged a firearm with intent to cause hurt to PW2 and she in fact suffered serious injuries to her neck and her vocal nerve. The ingredients of s. 3 had been proved.

[2] Section 3 does not require the prosecution to prove that it was the particular gun (P4) that was used by the accused to shoot which caused hurt to PW2. However the learned Judge was satisfied with the prosecution's evidence that the accused had used P4 to shoot PW2 and there was no break in the chain of evidence of the prosecution's witnesses.

[3] The quality of the identification evidence was good, despite the fact that it took place about 4 months later, so much so that the danger of a mistaken identification was lessened. The place where the shooting took place was brightly lighted and the accused was standing about 1 - 2 feet away from PW2. As such it was safe to convict the accused on these grounds and to sentence him to death by hanging.

[Accused sentenced to death.]

Cases referred to:

R. v. Turnbull & Ors. [1976] 3 All ER 549
R. v. Weeder [1980] 71 Cr App R 228

Legislation referred to:
Firearms (Increased Penalties) Act 1971, s. 3

Other source referred to:
Archbold, 42nd Edn., p. 999, para. 14-2

For the public prosecutor - Josephine Premla Sivaretnam
For the accused - Nimal de Silva; M/s. Karpal Singh & Co.

JUDGMENT

Mohamed. Dzaiddin J:

The accused was charged before me for an offence punishable under s. 3 of the Firearms (Increased Penalties) Act, 1971 ("the Act"). The charge reads as follows:

> That you on 12 March 1982, at about 11.20 p.m. in a shed at Thean Teik Estate, Air Itam, in the District of Georgetown, in the State of Penang, at the time of committing a scheduled offence, to wit, robbery, did discharge a firearm, with intent to cause hurt to one Goh Seak Jin (F) and that you have thereby committed an offence punishable under s. 3 of the Firearms (Increased Penalties) Act No. 37 of 1971.

Briefly, the evidence adduced by the prosecution are as follows. On the evening of 11 March 1982, there were several people gambling at an unnumbered wooden shed at Thean Teik Estate, Air Itam, Pulau Pinang. The shed had an area of approximately 10 square feet and without a wall. Madam Goh Seik Jin (PW2) was one of them. She was playing a game of "blangkas" with some friends and was seated on a wooden stool. The place was brightly lighted. At about 11.20 p.m. some people approached the shed. At first, she thought they came to gamble, but suddenly she heard someone shouting that they had come to rob the place. She also heard a shot being fired. Whilst other gamblers ran for cover, she stayed put on her seat. Then, one of the robbers came near her pointing a pistol at her. This man snatched her handbag and a necklace. He was about one to two feet away from her. He then tried to grab her bracelet but failed. He became angry and abused her in Cantonese and at the same time fired a shot at her hitting her left chin. She fainted and became unconscious. She was taken to the General Hospital, Penang. Madam Goh later identified the accused as the person who robbed and shot her on the evening in question.

Dr. Teh Keng Huang (PW4), attended to her that evening where her condition was bad. She had a gun-shot wound on the left side of her face at an area of the chin. It was an entry wound measuring 2½ by 2½ cm. PW4 could not find any exit wound. She was referred to the surgical unit and X-rays were taken to determine the injuries. According to Dr. Teh, the X-ray films showed that presence of a foreign body on the neck. This was confirmed by Dr. Raja Abdullah (PW7), the Consultant Radiologist who testified as to the presence of the foreign body on the left upper part of PW2's neck. In his opinion, the metallic foreign body appeared to be consistent with a bullet.

On 7 May 1982 Mr. Geh Sin Wah (PW8), a consultant surgeon attached to the Penang Specialist Centre, Logan Road; Pulau Pinang examined her after being referred by the Consultant Physician of Kangar General Hospital. She complained of a persistent irritating cough and hoarseness of her voice. Her previous X-ray films showed the presence of a metallic foreign body, in the shape of a bullet lodged against the spine of her neck. Mr. Geh repeated the X-ray of her neck with metallic markers to enable him to localise the exact position of the wound. Mr. Geh operated on her on 21 May 1982 where a metallic object, later identified

as a bullet (P9) was removed from the left side of her neck. Mr. Geh later gave P9 to ASP Ganapathy (PW5) at the Specialist Centre who subsequently handed it to ASP Mohamad bin Morad (PW11) of the 'A' Team, CID Georgetown, Pulau Pinang.

In the meantime at about 11.45 p.m. on the same evening, Inspector Faisal Libertus bin Abdullah (PW15), the Investigating Officer was informed about the incident. He visited PW2 at the General Hospital and met some of her friends. From the General Hospital, he proceeded to Air Itam Police Station where he met Chuah Hock Huat (PW1), the maker of Air Itam Police report No. 585/82. PW15 and his police party arrived at the scene at about 1 a.m. He found two make-shift tents adjacent to each other. The first tent had a canvas roof and the smaller one had a zinc roof. There was a wooden table and a long bench underneath the first tent. He noticed a red coloured liquid near the wooden table which he believed to be human blood. Both tents were brightly lit up with two electric bulbs in each tent. The electric supply was connected from a nearby coffee shop. He conducted a search of the scene and did not recover anything incriminating.

On 26 March 1982, Inspector Mohd. Faisal visited PW2 at the General Hospital and recorded a statement from her. At about 2.00 p.m. on the same day he received certain exhibits from ASP Mohamad bin Morad (PW11) which were recovered in Butterworth on 18 March 1982. Among the exhibits were one automatic auto STAR pistol (P4); one .38 Smith & Wesson special revolver (P13); five super-X bullets with empty casing, (P16A-D) and (P19); six 38 bullets (P14A-B), (P20A-C), (P21); five .25 auto bullets (P17A-E) and one empty magazine (P4A). On 29 March 1982 he packed P4 and P13 together with one home-made pistol (P15) and sent them to the Government Chemist at the Chemistry Department, Penang for examination. On 30 March 1982 he collected them back from the Chemist, Mr. Hoong Seng Hong (PW14). Mr. Hoong testified that he examined these exhibits to determine whether or not these guns had been fired. He found the presence of nitrate and nitride compound which were the product of combustion of smokeless powder. This indicated that the guns had been fired. Prior to this, the three exhibits were examined by the Police Armourer (PW12) who found the gun serviceable.

On 6 May 1982, PW14 received from Inspector Faisal an envelope containing five testfired expanded .25 Auto WW rimless cartridge cases and four testfired .25 calibre bullets. Then, on 3 July 1982 he received another envelope containing a plastic bottle (P8) with one expended bullet of .25 calibre. This bottle had a label bearing the name of PW2. On examination, PW14 came to a finding that the fine lines on the expended bullet (P9) correlated with the fine lines on the testfired expended bullet (P17). In his opinion the expended bullet (P9) was fired by the same pistol (P4) used to fire the bullet (P17).

In the meantime, on information received, Inspector Mohd. Faisal left for Kroh on 26 May 1982 to arrest the accused who was expected to be released on 27 May 1982 after serving sentence in Thailand. On 27 May at about 10.30 a.m. with the assistance of Kroh Police personnel, PW14 arrested the accused at Customs Complex, Bukit Berapit, Kroh, and brought him back to the Police Headquarters, Penang. The accused was later detained at the Pulau Tikus Police Station lock-up.

On 28 June 1982, Inspector Faisal arranged for an identification parade of the accused. PW2 was present at the parade, which was conducted by Inspector Zainuddin bin Ismail (PW6) in the Detectives Room of 'A' Team Division at about 3.15 p.m. Inspector Ismail arranged for 12 male Chinese of similar complexion and appearance as the accused for the parade. The accused was brought from Pulau Tikus Police Station and PW6 explained to the accused through DPC Fan Koon Seng the purpose of the exercise. The accused was told to choose

his position in the parade. He opted to stand at the end of the parade line. When PW2 entered the room, she had no difficulty in picking up the accused and identified him as the person who shot her on the evening of 12 March 1982. After the identification parade, PW2 was brought to the Investigating Officer's office to identify the gun which was used to shoot her. Inspector Faisal produced the three guns. P4, P13 and P15. It seemed Madam Goh had also no difficulty in picking up P4.

At the close of the Prosecution evidence, I found there was a *prima facie* case made out against the accused, if unrebutted, would warrant a conviction. The accused was then asked to answer the charge. The three alternatives were explained to him. He elected to give evidence on oath.

Defence

In his defence, the accused stated that about one week before the commission of the crime he was unemployed and met some friends at a coffee shop in Sungai Siput who invited him to visit Penang. One of his friends, Ah Tak, promised to get him a job in Penang. On 12 March 1982 they left for Penang and reached Butterworth at about 12 noon. There, Ah Tak introduced him to another man and then left for Penang in a car driven by Tai Chek Low. The latter took them to a rest house. At about 6 p.m. they went out for dinner but returned to the rest house after dinner as he planned to return Ipoh that evening. As the accused and his accomplices got into a car Ah Tak told him that they were going to commit robbery. The accused protested and refused to follow them. However, he was told by one of them that it was not necessary for him to participate in the robbery but only to keep a lookout for people and should anything happen he was to shout "sun soi" and to hoot the car.

The accused further testified that on reaching the scene of the crime, which he later came to know as Thean Teik Estate, he came out of the car and stood near the front near-side. The rest of the accomplices proceeded to a lane. About 10 minutes later, he heard shots which he thought was the sound of fire crackers. He remained near the car until he saw Ah Tak returning to the car carrying something in his hands. The accused and his accomplices then boarded the car and sped of. Subsequently, he was asked by one of the accomplices to disappear because the police might be looking for him. He fled to Thailand where he was arrested for illegal entry, charged and sentenced to three month's imprisonment. On his release, the Malaysian police arrested him at Kroh and was taken back to Penang where he was detained in Pulau Tikus Police lock-up.

On 8 June 1982 he gave a cautioned statement to Inspector Ong Wah Cheng (DW2).

On 28 June 1982 an identification parade was held at the Police Head quarters. The accused testified that he was never explained about the procedure of the parade and at the time of the parade he had double handcuffs. He claimed that he had a very short hair, long moustache and beard, whilst some of the twelve persons in the parade had long hair and no moustaches. The accused also stated that he saw his photograph appearing in the Chinese newspapers and the English "STAR" newspapers. When shown a photocopy of the "STAR" dated 20 March 1982 the accused confirmed that it was his photograph. However, under cross-examination, he agreed that the said photograph was taken when he was young and it was not a true reflection of how he looked in March 1982.

On the accused's cautioned statement D22, it must be noted that the said statement merely confirmed his entire evidence in Court.

From the accused's evidence, it is abundantly clear that he admitted being near the scene of the crime on the evening of 12 March 1982, but denied robbing and shooting Madam Goh (PW2). It was also a defence case that the identification of the accused by PW2 was unreliable as there was no corroboration of her evidence.

Therefore, after considering the entire evidence in this case, I was satisfied that the Prosecution had proved their case beyond all reasonable doubt. There was an overwhelming evidence that on the night in question a robbery took place at the gambling shed at Thean Teik Estate. On this point, I accepted the evidence of Chua Hock Huat (PW1), who was at the scene and the maker of the first information report (P3) and Madam Goh (PW2). In fact the accused in his defence admitted that he was at the scene of the crime with his accomplices to commit robbery. Needless to say, robbery is a "scheduled" offence under s. 3 of the Act.

Secondly, there was also an overwhelming evidence that in the course of the commission of the said robbery, the accused shot PW2 when he tried to snatch her bracelet but did not succeed. He then discharged a firearm with intent to cause death or hurt to PW2. In this case, I was satisfied on the evidence that PW2 suffered serious injuries to her neck and vocal nerve as a result of the accused discharging a firearm. The evidence of Dr. Teh (PW4), Dr. Raja Abdullah (PW7) and most important of all Mr. Geh Sim Wah (PW8) clearly showed not only the nature of the injuries suffered by PW2, but also the undisputed fact that a bullet (P9) was recovered from the left side of PW2's neck. It is a logical conclusion that the natural consequences of a gunshot is either to cause death or hurt to a person. Further, s. 3 of the Act merely provides for a discharge of a firearm with intent to cause death or hurt and it is immaterial whether hurt is thereby caused or not. In the circumstances, I was satisfied that the ingredients of s. 3 had been proved by the Prosecution.

Thirdly, I accepted the evidence of Mr. Hoong Seng Hong (PW14), the Government Chemist and Hasni Hitam Sopki (PW12), the police armourer regarding the pistol (P4) and the bullet (P9). In his evidence, PW14 testified that the expended bullet (P9), which was removed from the left neck of PW2 was fired from the pistol (P4). PW12 merely confirmed the serviceability to the said pistol, (P4).

Mr. Nimal De Silva, Counsel for the accused, submitted that under s. 3 of the Act the onus is on the prosecution to prove that it was the accused who fired the gun and that he used the particular gun i.e. P4, to shoot PW2. According to Counsel, the prosecution had failed to prove both elements. Counsel pointed out that the Investigating Officer (PW15) had testified that three guns were recovered, but there was no positive identification of P4 being the very gun used by the accused. Counsel submitted that the evidence of PW2 as to P4 was unsatisfactory. The evidence that one suspect led the police to the recovery of the three guns did not link the accused with the use of P4. On this issue, I do not think it is the requirement of s. 3 of the Act that the prosecution must prove that it was P4 that was used by the accused to shoot with the bullet P9 which caused hurt to PW2. In my judgment, the offence is committed once the accused discharged a firearm with intent to cause death or hurt to PW2. As pointed out earlier, the evidence of Mr. Geh (PW8) and Mr. Hoong, the Government Chemist (PW14) clearly showed that the prosecution has proved these ingredients. Further, in the present case the prosecution had adduced more than sufficient evidence to prove that the accused had used P4 to shoot PW2. The chain of evidence of police witnesses regarding the recovery of the guns and ammunitions, in particular P4, had not been broken right from the time of the arrest of one of the suspects in the said robbery until the trial of the accused. For the above reasons I rejected Counsel's submission.

The case for the prosecution must surely depend on the identification of the accused. Thus, the main issue at the trial was whether he had been correctly identified as the person who robbed and shot PW2. Here, the Court must consider and evaluate the evidence of Madam Goh (PW2). She stated in her evidence that she had a good look at his face. At the material time, the accused wore a blue jacket and he had no moustache or glasses on. He was between 21 to 22 years of age. Further PW2 testified that they were standing about one to two feet apart. On 28 June 1982, she identified the accused at an identification parade. It must be borne in mind that the parade was conducted about four months after the incident.

Under cross-examination, she stated that she gave a description to the police and told the officer that the person who shot her spoke in Cantonese. Further, she agreed that the incident happened very fast and that there was pandemonium. With regard to the identification parade, PW2 denied that she participated in photographic identification before the actual identification parade. She stated that she could not remember the position of the accused but she was able to identify him amongst the 12 persons. Under further cross-examination, she stated that she was able to identify him because at the time of the incident she could clearly see his face.

With regard to the gun (P4), Madam Goh testified that she had a good look at the gun in the accused's hand. It was about 5 to 6 inches long. She stated that she was able to recognise the gun and identified P4 by its size and also because she was standing very close to the accused at the time of shooting.

It was not disputed the place of the shooting was brightly lighted. According to PW1 the electricity supply to the shed was connected from an adjoining house and Inspector Faisal also testified that both tents had two electric bulbs each and it was bright enough to see people and even to read or write. In fact the electricity supply was connected from the nearby coffee shop.

I accepted the evidence of PW2 that she was very close to the accused, that the shooting took place very fast and that the place was brightly lighted. Based on the evidence of the Investigating Officer I found no material discrepancies between PW2's evidence and the description she gave to PW15 of the accused at the General Hospital. Considering these evidence as a whole, and there was no suggestion that her observation of the accused that evening was impeded in any way, coupled with my observation of the demeanour of Madam Goh, which satisfied me that she was telling the truth, it was therefore my finding that the accused had been positively identified by PW2. On this issue of identification, we must remember that it has become an established practice for a witness to be asked to identify the accused at the earliest possible opportunity after the event, and for evidence to be given of that act of identification. Precisely, this is the objective of an identification parade.

On P4, I also accepted the evidence of PW2. Conceding that three guns were recovered and they were placed before PW2 for identification, I was satisfied with her evidence and her explanation that she was able to identify P4 as the gun used by the accused because P4 was smallest in size compared with P13 and P15.

On the issue of identification Mr. Nimal De Silva submitted that this Court should exercise caution in PW2's evidence because it was visual identification without corroboration. According to Counsel, as the shooting happened very fast and there was pandemonium, he suggested that in the circumstances PW2 was unable to describe fully about the accused. Further, it was submitted that as the police had released the photographs of the accused to the Chinese newspapers and the "STAR", there was a possibility of PW2 having seen the photograph which would vitiate the identification parade.

Counsel relied on *R. v. Turnbull & Ors.* [1976] 3 All ER 549. In that case, the English Court of Appeal has laid down guidelines to be observed by trial Judges when "identity" is an issue.

The learned authors of *Archbold*, 42nd Edn. at para. 14-2 (p. 999) have summarised these guidelines to be as follows:

> First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleged to be mistaken, the Judge should warn himself of the special need for caution before convicting in reliance on the correctness of the identification.
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> Secondly, the Judge should examine closely the circumstances in which identification came to be made. Such questions as: how long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way? Had the witness ever seen the accused before? How often? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? are important factors to be considered.
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> Thirdly, the Judge should remind himself of any specific weakness which had appeared in the identification evidence.

Turnbull was considered and applied in *R. v. Weeder* [1980] 71 Cr App R 228 where the Court emphasised that what mattered was the quality of identification evidence. If the quality was good and remain good at the close of the accused's case, the danger of a mistaken identification was lessened; but the poorer the quality, the greater the danger. However, in the present case, having reminded myself of the guidelines in *Turnbull*, there was no doubt in my mind that the accused was positively identified by PW2.

On the defence, after considering the accused's evidence, I was satisfied that he had failed to create any doubt in the prosecution's case. I could not accept his explanation that he was merely at the scene of the crime and did not participate or to be precise he was not the person who robbed and shot PW2 as probable or reasonable. Therefore having considered the entire case, I was fully satisfied that upon the evidence of the prosecution witnesses, whom I accepted to be witnesses of truth, I found the prosecution had established a case against the accused beyond all reasonable doubt. In the circumstances I found the accused guilty and convicted him.

Sentence

It is common knowledge that there were still many illegal firearms being carried around in this country, which the police with all the resources and manpower could not detect or apprehend. Under the Arms Act 1960, the punishment for a person being in unlawful possession of firearms is seven years imprisonment and a fine not exceeding RM10,000 or both. Because of the prevalence of cases where firearms were used or discharged in the commission of offences, such as robbery, extortion and kidnapping, the Legislators had found it fit to amend the law and introduced increased penalties for these offences. By s. 3 of the Firearms (Increased Penalties) Act 1971, any person found guilty of discharging of firearms in the course of these scheduled offences shall be punished with death. The public needed protection and the law gave such protection by imposing the most deterrent sentence, where upon conviction the only punishment is death. Rightly, I had no sympathy for the accused, who together with his accomplices had robbed innocent people and in the course of the robbery attempted to kill one of the victims. Fortunately, the accused was quite an amateur

shooter, for otherwise Madam Goh would not be here to testify against him. Be that as it may, she had suffered severe injuries which she had to bear for the rest of her life. Accordingly, I sentenced the accused to death by hanging.

Also found at [1988] 1 CLJ 534